(3)

No. 04-54

In The
Supreme Court of the United States

WILLIAM A. APPLING, et al.,

Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Petitioners are former State Farm agents whose contracts were terminated by State Farm Mutual Automobile Insurance Company, State Farm Fire and Casualty Company, State Farm Life Insurance Company, and State Farm General Insurance Company (collectively "State Farm"). The contracts provided that either party could terminate the contract simply by giving written notice. State and federal courts throughout the country have held repeatedly that this termination language in the State Farm contract unambiguously permitted the contract to be terminated at the will of either party. Despite these cases, Petitioners filed suit claiming that State Farm's termination of their contract was wrongful. Petitioners argued that, as a matter of offensive collateral estoppel, a prior unpublished memorandum decision by the Ninth Circuit trumped all of the prior contrary decisions and established, as a matter of law, that State Farm's agreement could be terminated only for good cause.

Applying the principles established by this Court in *Park Lane Hosiery Co. v. Shore,* 439 U.S. 322 (1979), the district court determined that, in its exercise of discretion, offensive collateral estoppel was not appropriate. Among other things, the district court observed that the plethora of prior authority finding the same contract language to be terminable at will made it inappropriate to give preclusive effect to contrary language in the unpublished decision. The Ninth Circuit held that the district court had properly exercised its discretion in reaching this conclusion. On the merits of the contract construction issue, the Ninth Circuit also affirmed the district court's determination that, as a matter of law, the contract was terminable at will.

QUESTIONS PRESENTED – Continued

Dissatisfied with the district court's ruling, Petitioners waited more than a year after judgment was entered and then filed an independent action alleging that the summary judgment should be set aside because State Farm and its counsel had allegedly failed to produce in discovery certain documents in the possession of a retired State Farm executive. The district court, which was fully familiar with the prior summary judgment proceedings, determined that Petitioners' allegations did not meet the stringent standards required to set aside a prior judgment. The Ninth Circuit concluded that the district court had acted well within its discretion and affirmed that judgment as well.

Properly framed, the Petition raises the following issues:

1. Did the Court of Appeals for the Ninth Circuit err in determining that the district court acted within its discretion in refusing to give preclusive offensive collateral estoppel effect to dicta in a prior unpublished memorandum decision which was contrary to every other published and unpublished decision issued by state and federal appellate courts across the country construing that same contract?

2. Did the same Court of Appeals for the Ninth Circuit err in affirming the district court's exercise of discretion in concluding that Petitioners' allegations that documents had not been produced in discovery in response to an overbroad third party subpoena did not amount to fraud on the court and did not warrant setting aside the prior summary judgment?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Respondent State Farm Mutual Automobile Insurance Company is a mutual insurance company owned by its policyholders. Respondents State Farm Fire and Casualty Company, State Farm Life Insurance Company and State Farm General Insurance Company are wholly-owned subsidiaries of Respondent State Farm Mutual Automobile Insurance Company.

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STATEMENT OF THE CASE

In April 1997, Petitioners filed suit against State Farm contending, among other things, that State Farm acted improperly in terminating the contracts of more than twenty of the named Petitioners. The contracts permitted either party to terminate the contract simply by giving written notice. Petitioners contended that the contract language permitting termination on written notice was ambiguous and allowed termination only on a showing of good cause. Petitioners' wrongful termination claims arose under state law in several different states, including California.

Petitioners and State Farm filed cross-motions for summary judgment on Petitioners' wrongful termination claims. State Farm sought summary judgment on the ground that, as a matter of law, the contract was unambiguously terminable at will. Petitioners sought summary judgment on the ground that language in an unpublished Ninth Circuit memorandum decision was collateral estoppel on the issue of whether the contract was terminable only for good cause. That prior memorandum decision affirmed summary judgment in favor of State Farm on a former agent's wrongful termination claim but indicated, in dicta, that the contract was susceptible of a good cause construction. *Sandberg v. State Farm Mut. Auto Ins. Co.*, 182 F.3d 929 (9th Cir. 1999) (mem disposition), *cert. denied*, 528 U.S. 1118 (2000).

Recognizing that the decision whether to give offensive collateral estoppel effect to a prior decision rests within its discretion, the district court concluded that the prior *Sandberg* decision should not be given collateral estoppel effect. Pet. Supp. App. at 3a-4a. The district court noted that several other published and unpublished

appellate decisions had repeatedly held that the State Farm contract was terminable at will. Pet. Supp. App. at 7a. The district court further noted that the *Sandberg* decision had actually affirmed the decision by State Farm to terminate the contract. As such, the language in *Sandberg* dealing with construction of the contract was not necessary to the judgment. *Id.* at 9a.

The Ninth Circuit affirmed the district court's decision. The Ninth Circuit recognized that the decision whether to apply collateral estoppel rested within the district court's discretion. Pet. App. at 11a. The Ninth Circuit held that the district court properly applied the standards established in *Park Lane Hosiery* and acted within its discretion in determining that no offensive collateral estoppel effect should be given. The Ninth Circuit agreed that the "stark landscape of inconsistent prior interpretations of the termination clause weighs heavily in favor of granting *Sandberg* no preclusive effect." Pet. App. at 13a. The Ninth Circuit cited to nine published and unpublished decisions wherein federal and state courts had construed the State Farm contract to be terminable at will, under the relevant state's law. Pet. App. at 14a.

After the district court's summary judgment decision, Petitioners filed an independent action to set aside the summary judgment on the ground that State Farm and its counsel had withheld documents from discovery directed at a third party witness. The discovery consisted of a 1998 subpoena directed at a former State Farm executive who retired in 1976. That subpoena sought documents possessed by the former executive generated after January 1, 1988 – twelve years after the executive left State Farm. State Farm, through its counsel, interposed objections to the subpoena on behalf of the former executive. Thereafter,

Petitioners took no further action. They made no attempt to depose the former executive or to follow up on the subpoena.

Accepting Petitioners' allegations at face value, the district court nonetheless concluded that State Farm and its counsel did not commit a fraud on the court in responding to the subpoena. The district court noted that State Farm's objections to that subpoena were innocuous, and the witness in question had authorized State Farm to respond to the subpoena on his behalf. Pet. Supp. App. at 32a n.9. The district court concluded that Petitioners' allegations did not provide a basis to set aside the prior judgment and exercised its discretion to dismiss the complaint. The Ninth Circuit affirmed the district court's decision, concluding that the district court, which had issued summary judgment in the first instance, was well within its discretion in determining that it had not been victimized by a fraud on the court.

ARGUMENT

I

PETITIONERS HAVE NOT ARTICULATED A REASON JUSTIFYING DISCRETIONARY REVIEW BY THIS COURT

Petitioners' arguments in their petition amount to nothing more than a restatement of their belief that the Ninth Circuit's dissenting opinion was correct and the majority opinion was incorrect. Petitioners do not contend that the Ninth Circuit's decision conflicts with any decision of another circuit or with any decision of any state court of last resort. Nor have Petitioners contended that the Ninth Circuit decision involves a gross departure from the accepted

and usual course of judicial proceedings or that the Ninth Circuit's decision presents an important question of federal law or somehow conflicts with any prior decision of this Court.

The true gist of each of Petitioners' questions is whether, in a highly fact-specific context, the district court properly exercised its discretion. With respect to the district court's refusal to apply offensive collateral estoppel effect to language in a prior, unpublished Ninth Circuit decision, the district court considered each of the factors identified in this Court's prior decision in *Park Lane Hosiery* and concluded, on balance, that it was not appropriate to give preclusive effect to language in that memorandum decision. Petitioners do not contend that *Park Lane Hosiery* does not give broad discretion to district courts to make this type of determination.

Similarly, to the extent that the Petition challenges the dismissal of their independent action, Petitioners are essentially challenging the district court's exercise of discretion based on highly case-specific facts. It is well established that the decision to set aside a prior judgment based upon alleged fraud on the court rests soundly within the discretion of the district court. *Levi Strauss & Co. v. Shilon*, 121 F.3d 1309, 1313 (9th Cir. 1997). Petitioners do not take issue with this settled rule of law. Rather, Petitioners' challenge amounts to nothing more than a complaint about the manner in which the district court, which was the same court that previously granted summary judgment, weighed the relevant factors in exercising its discretion.

Neither of the issues presented by Petitioners raise any issue of general application or a conflict with any decision previously issued by this Court, by any other

circuit court or by any state court of last resort. There is no basis or need for the Petition to be granted.

II

THE LOWER COURTS DID NOT ERR IN RULING IN FAVOR OF STATE FARM

In both the main action and in Petitioners' independent action, Petitioners' claims were properly resolved in favor of State Farm. When the Ninth Circuit affirmed the summary judgment in favor of State Farm, each and every published decision construing State Farm's contract had concluded that the contract was terminable at will. This included a recent *en banc* decision by the Eighth Circuit. *Olander v. State Farm Mut. Auto Ins. Co.*, 317 F.3d 807 (8th Cir. 2003) (*en banc*), *cert. denied*, 124 S. Ct. 179 (2003). Several unpublished decisions had reached the same conclusion including three unpublished decisions issued by California courts. In asking the district court to impose offensive collateral estoppel by reason of the Ninth Circuit's prior unpublished memorandum decision in *Sandberg*, Petitioners were essentially arguing that certain language in the *Sandberg* decision trumped these many other state and federal cases that had reached the contrary conclusion. Faced with overwhelming authority to the contrary, the district court acted well within its discretion to conclude that, under the principles announced by this Court in *Park Lane Hosiery*, it would be inappropriate to give collateral estoppel effect to the *Sandberg* memorandum decision.

The district court's decision not to give preclusive effect to language in the unpublished *Sandberg* decision was further supported by the peculiar circumstance surrounding

that decision. The Ninth Circuit in *Sandberg* actually affirmed summary judgment in favor of State Farm as to the former agents' claim for wrongful termination. The *Sandberg* court determined that the undisputed facts established that State Farm had good cause to terminate the contract. It was in this context that the unpublished memorandum decision in *Sandberg* stated that the contract was reasonably susceptible of either an at will or good cause construction. While the Ninth Circuit declined to characterize the language in *Sandberg* as dicta, the at will/good cause determination made in *Sandberg* was superfluous to the *Sandberg* holding. At the very least, the fact that this portion of the opinion was not the basis of the summary judgment provided additional reason for the district court and Ninth Circuit's determination that it should not be given preclusive effect.

Petitioners' argument that the majority opinion failed to give *stare decisis* effect to the *Sandberg* dicta rests on several faulty assumptions. First, as an unpublished decision, the *Sandberg* decision was never intended to be *stare decisis*. Second, as to State Farm, the unpublished *Sandberg* decision could be binding vis-a-vis third parties only under principles of **offensive** collateral estoppel which the lower courts found were not met. Third, the majority opinion concluded that the *Sandberg* dicta did not correctly apply California law to State Farm's contract language. Under these circumstances, it can hardly be said that the Ninth Circuit's majority opinion improperly decided the contract construction issue on the merits.

Similarly, the lower courts' determination that the prior summary judgment should not be set aside based on Petitioners' "fraud on the court" claim is well supported by the record. It is especially significant that the district court which was asked to make the decision was the same

court that had issued summary judgment in the first place. If and to the extent that any allegations of discovery abuse were truly material to its decision, the district court was uniquely situated to make that call. Under these circumstances, the district court properly exercised its discretion to conclude that mere allegations that documents were not produced in discovery in response to a patently deficient subpoena did not amount to fraud on the court.

Petitioners seriously mischaracterize their own allegations of supposed misconduct. Petitioners assert that State Farm fraudulently purported to represent a third party witness. In fact, based upon declarations included as part of Petitioners' complaint, the district court concluded that it was "disinclined to construe Orrick's conduct with respect to the representation of Keller [the third party witness] [as] anything but proper especially in light of Keller's declaration that he called State Farm about the subpoena and was told that State Farm would take care of it." Pet. Supp. App. at 32a n.9. Moreover, while the court concluded that the validity of the objections made to the subpoena on Keller's behalf were not necessary to the resolution of the motion to dismiss, the court described those objections as "innocuous." *Id.* Petitioners made no allegation that they ever took any steps to further pursue their request for documents. Nor did they make any allegations that they had ever contacted Keller themselves or proposed any other witnesses concerning the matters supposedly known to Keller. Essentially, as the district court found, plaintiffs made a tactical decision not to pursue production from Keller which simply resulted in non-disclosure of evidence which it later alleged to be important to their case. Pet. Supp. App. at 34a.

While Petitioners try to contend that the lower courts' decisions to dismiss their independent action were based

solely upon Petitioners' own lack of due diligence, an analysis of both the district court and Ninth Circuit's decisions demonstrate that Petitioners' lack of diligence was only one factor considered by the lower court. Equally important was the fact that the alleged non-disclosure of documents in the discovery process did not constitute a fraud on the court and the determination that the supposed conduct did not meet the high standard established by this Court in *United States v. Beggerly*, 524 U.S. 38, 47 (1998) which requires a "grave miscarriage of justice" to set aside a prior judgment.

CONCLUSION

For the reasons set forth above, Respondents respectfully request that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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